

**BOARD OF ASSESSMENT APPEALS,
STATE OF COLORADO**

1313 Sherman Street, Room 315
Denver, Colorado 80203

Docket No.: 46429

Petitioner:

DENVER CUTLERY LEASING, LLC,

v.

Respondent:

DENVER COUNTY BOARD OF COMMISSIONERS.

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on November 8, 2007 Diane M. Devries, Karen E. Hart, and Lyle D. Hansen presiding. Petitioner, C. Richard Rudibaugh, appeared pro se. Respondent was represented by Max Taylor, Esq. Petitioner is requesting an abatement/refund of taxes on the subject property for tax years 2001, 2002, 2003, and 2004.

PROPERTY DESCRIPTION:

Subject property is described as follows:

The subject property consists of personal property located in Denver County.

Denver County Schedule No.:	Tax Year(s)
322A 405 382 32 2	2004
428A 405 382 42 8	2003
188A 405 382 18 8	2003, 2004
312A 405 382 31 2	2001
405 382 00 0	2001, 2002, 2003, 2004
320A 405 382 32 0	2003, 2004
320A 373 368 00 0	2004

Petitioner does not dispute the actual value assigned to the subject property. Petitioner contends that they are not responsible for the property tax on the subject property, because the subject property was sold to their customers. Petitioner's representative, Mr. Rudibaugh testified that Petitioner sells new and used restaurant equipment, like the subject property, to restaurant

businesses. Petitioner provides the financing of the sales of restaurant equipment. Mr. Rudibaugh testified that on the date of the sales, one hundred percent of the sales tax is collected and remitted and the transaction is treated as a completed sale. The financing term on the equipment sales ranges from twelve to eighteen months. Title to the restaurant equipment is conveyed to the buyer at the end of the financing term. Mr. Rudibaugh testified that there is no fair market value buyout at the end of the term, and that this condition distinguishes a true lease from a sale.

Respondent contends that Petitioner is responsible for the personal property tax on the subject property because the restaurant equipment is conveyed from Petitioner to another party by a lease document. Respondent assigned a total actual value of \$481,142.00 to all schedule numbers for all tax years at issue.

The issue presented to the Board is whether Petitioner is responsible for the personal property tax on the subject property. Colorado Revised Statutes section 39-5-104.5 states that “[t]he owner of taxable personal property on the assessment date shall be responsible for the property tax assessed for the full property tax year without proration.” The question in this case is who is the “owner” of the subject property under the agreements at issue. In order to determine this the Board must first decide whether or not the agreements underlying this appeal are true leases or conditional sales agreements. If they are conditional sales agreements, the question then becomes whether or not title transferred to the customers as part of the agreements. If so, the customers are responsible for the tax. If not, Petitioner is responsible for the personal property tax on the restaurant equipment throughout the terms of the agreements.

Petitioner is a supplier of equipment for restaurants and bars where Petitioner enters into “Equipment Lease Contracts.” Respondent’s Exhibit 1 is a sample contract utilized by Petitioner and is referred to on the cover sheet as an “Equipment Lease Contract.” The cover sheet lists the name and address of the leasing customer, the exact equipment leased, and the payment schedule. The payment schedule includes lease terms, total number of payments, total cost of equipment, total cost of lease, sales tax, and the value of the buyout at lease end. The bottom of the cover sheet has location for the date and initials of the Lessor and Customer. The attached document is identified as “Conditions of Equipment Rental Agreement” (“Conditions”).

Respondent’s Exhibit 1 deals with the lease or sale of a double stack pizza oven and sets forth the total cost of the equipment at \$11,500.00, the total number of payments (18), the amount of each payment set at \$579.53, sales tax of \$506.00, document fee and freight at \$900.00, the total cost of the lease at \$13,812.53, and a security deposit of \$2,875.00. The contract also states that there is a \$1.00 buyout at the end of the lease.

The Conditions contain the following provisions among others:

Lessor owns the Equipment; Lessee shall have the right to use the Equipment for the full Lease term provided Lessee complies with all of the terms and conditions of this Lease Lessee shall not move the Equipment from this location during the term of this Lease without the prior consent of Lessor, which it may grant or deny in its sole discretion

Lessee further agrees that upon termination of this Lease by expiration, or otherwise, Lessee will return the Equipment to Lessor in the same condition and state of repair as delivered to Lessee hereunder, ordinary wear and tear excepted.

Lessee agrees to pay all license and registration fees, sales and use taxes, personal property taxes and all other taxes and charges relating to the ownership, leasing, rental, sale purchase, possession or use of the Equipment as part of the lease payments due under this Lease or as billed by Lessor. If Lessor pays any such tax on Lessee's behalf, Lessee will reimburse Lessor for all such payments

Lessee shall advise Lessor of its intention to return the Equipment to Lessor at the end of the Lease term. Provided Lessee has given timely notice, Lessee shall return the Equipment, freight and insurance prepaid, to Lessor in good repair, condition and working order, ordinary wear and tear excepted, in a manner and to a location designated by Lessor

Lessee authorizes Lessor to file a financing statement with respect to the Equipment and grant Lessor the right to sign such financing statement on Lessee's behalf LESSEE ACKNOWLEDGES THAT THIS LEASE IS A 'FINANCE LEASE' AS THAT TERM IS DEFINED IN ARTICLE 2A OF THE UCC.

With respect to a security deposit, the Conditions state that "If all of the terms of this Lease are fully performed by Lessee, the security deposit shall be refunded to Lessee within thirty (30) days after the satisfactory return of the Equipment to Lessor and completion of the term of this Lease."

According to testimony at the hearing, when Petitioner entered into the contracts at issue, Petitioner treated the contracts as sales on their sales tax returns and remitted one hundred percent of the sales tax owed to the appropriate taxing authority. At the time the contracts were entered into, Petitioner collected sales tax and provided the lessee or purchaser with an amortization payment booklet.

Mr. Rudibaugh testified that they have always treated the transactions covering the subject property as sales which consummated on the day the lease was entered into as evidenced by the fact they collect one hundred percent of the sales tax on day one. Petitioner does not keep any of the equipment underlying the "Leases" on its books and does not depreciate them as a result. According to Mr. Rudibaugh, ninety-four percent of Petitioner's customers paid personal property tax as if they owned the equipment underlying the contract. Petitioner also filed UCC filings to ensure a security interest in the equipment.

According to the current version of the Assessor's Reference Library, Vol. 5, section 7.48, an agreement identifying itself as a lease may be a conditional sales agreement and vice versa. Personal property under a true lease agreement should be assessed to the lessor of the personal property. *5 Assessor's Reference Library: Personal Property Manual 7.48* (2008). Section 7.48 continues by stating that with respect to conditional sales agreements, if the seller retains title to the property for collateral or security purposes, the seller is considered the legal owner of the property and is responsible for reporting the installed cost and location of the personal property. In contrast, if legal title is passed to the lessee, it is the lessee's responsibility to report the location and installed cost to the appropriate county assessor. *Id.*

According to section 7.49, criteria for a true lease are as follows: (1) a lease is cancelable on a monthly or annual basis; (2) an optional purchase price at the end of the agreement is at market value; (3) the present value of the lease payments is less than the purchase price of the personal property; (4) the agreement specifies ownership of the personal property is retained by the lessor; and (5) the lessor is treating the property as a depreciable asset. *Id.* at 7.49.

In contrast, section 7.49 sets out the following criteria for a conditional sales agreements: (1) the lease period is approximately the same as the economic life of the asset; (2) the present value of the payments is the same or greater than the purchase price of the personal property; (3) lessee is treating the property as a depreciable asset; (4) the agreement indicates passage of legal title to the lessee with a security interest retained by the lessor until the end of the agreement. *Id.*

Based on the figures presented in Respondent's Exhibit 1, the present value of the payments appears to be the same or greater than the purchase price of the personal property. Moreover, the \$1.00 buyout at the end of the contract does not appear to be the market value of a pizza oven that is only eighteen months old. Additionally, there was undisputed testimony that Petitioner does not keep any of the equipment underlying the contracts on its books and does not depreciate them as a result. These facts indicate that the parties entered into a conditional sales agreement rather than a lease.

On the flip side, the Conditions state that lessor owns the equipment, granting the lessee only a right to use the equipment during the lease term; the lessee agrees to return the equipment at the end of the lease term. These contract provisions support the conclusion that the contracts are leases rather than conditional sales agreements.

On balance, however, it appears more likely that the contracts are conditional sales agreements given the economics underlying the contract. The Board finds that the contracts are conditional sales agreements. The question then becomes whether legal title passed to Petitioner's customers. Based on the terms of the agreements, it appears that legal title never passed to Petitioner's customers. Paragraph 6 of the Conditions states that the lessor owns the equipment with the lessee simply having the right to use it. Paragraphs 7 and 13 of the Conditions discuss how the lessee will return the equipment to the lessor, which are terms contrary to the conclusion that legal title passed to the lessee.

While Paragraph 9 of the Conditions states that the lessee agrees to pay all personal property taxes, the parties cannot unilaterally determine who is legally responsible for the personal property taxes at issue. While Petitioner may have a contract right to reimbursement for personal property taxes paid, Petitioner is legally responsible for the personal property taxes because title and thus ownership in the equipment never passed to the customers during the terms of the contracts.

ORDER:

The petition is denied.

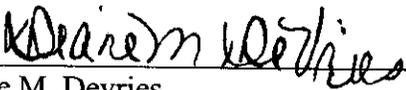
APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Colorado Revised Statutes ("CRS") section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

Colo. Rev. Stat. § 39-10-114.5(2) (2007).

DATED and MAILED this 13th day of March 2008.

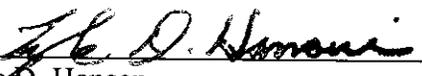
BOARD OF ASSESSMENT APPEALS



Diane M. Devries



Karen E. Hart

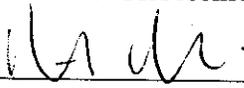


Lyle D. Hansen

This decision was put on the record

MAR 13 2008

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.



Heather Heinlein

